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IN THE

Supreme Court of the United States

October Term, 1950.

No. 453.

RAY H. GARNER, HARRY BECKERMAN, AIDA BELDNER, JOHN B. BROWN, CARRIE L. DICK, MARY E. GRUNEWALD, EUGENE HALLETT, MARGARET B. HASKELL, EDWARD HAVENS, CORNELIUS LAWRENCE, VERA MANN, OLA ROSS PACIFICO, DANA PLATT, EUGENE REED, FRANCES SCHWARTZ, WILLARD SMART, FRANK TORREANO,

Petitioners,

vs.

BOARD OF PUBLIC WORKS OF THE CITY OF LOS ANGELES; CLARENCE J. DERRICK, JOSEPH O. DONOVAN, LOUIS M. DREVES, FRANK GILLELEN, EDWARD L. TAYLOR and MILTON OFFNER, as Members of the Board of Public Works of the City of Los Angeles; BOARD OF CIVIL SERVICE COMMISSIONERS OF THE CITY OF LOS ANGELES; SAMSON A. LINDAUER, JUSTIN W. GILLETTE, CHARLES E. ARNN, RANSOM M. CALLICOTT, and MRS. IDA S. LAZARD, as Members of the Board of Civil Service Commissioners of the City of Los Angeles; DAN O. HOYE, City Controller of the City of Los Angeles THE CITY OF LOS ANGELES, a Municipal Corporation,

Respondents.

PETITIONERS' REPLY BRIEF.

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PETITIONERS' REPLY BRIEF.

The importance of the questions raised in the petition for writ of certiorari are accentuated by respondents' arguments in opposition. The gravity of the issues presented in the petition is emphasized not only by respondents' affirmative statements; it is increased by the respondents' failure to comment upon the real constitutional questions

involved on this proceeding. The logic of the respondents' position is that there are no limits upon the power of a state to impose test oaths upon public employees or, indeed, upon any segment of the population whose activities are in some way regulated or controlled by state machinery. Under such circumstances, it is respectfully submitted, federal questions of the most far-reaching and profound importance are herein presented.

I.

The respondents' brief in opposition makes no reference to this Court's decisions in *Parker v. County of Los Angeles; Steiner v. County of Los Angeles,* 337 U. S. 929; 338 U. S. 327. We have, therefore, the implicit admission that the issues raised in those cases are the same as those involved herein. Those issues this Court characterized as "serious" and it was because of the seriousness of the constitutional questions which rose from the enactment of the so-called loyalty law that this Court granted certiorari. The importance of the constitutional questions has not diminished since December 5, 1949, when the *Parker* and *Steiner* cases were decided. On the contrary, this Court may judicially notice the rising tide of "loyalty laws" and "test oaths" which have either been enacted or proposed by state and local subdivision of government affecting millions of citizens and which have been the subject of heated controversy in the public forums. There is widespread doubt that these measures are compatible with guaranteed constitutional rights. The issue should be resolved by this Court.

The respondents' statement of "issues presented on certiorari" (Br. p. 6) furnishes ample reason for the grant of certiorari herein. The respondents' pose the inquiry as to whether, "assuming a federal question is presented," a municipality may dismiss an employee because he refused "to take an oath of allegiance"; refused "to assert his past loyalty for a five-year period"; refused "to state whether or not he had been a member of certain named organizations." To pose the questions in this manner, glossing over their serious constitutional implications, is sufficient to call upon this Court for a definitive reply.

For it is not merely an "oath of allegiance" which is involved herein. The Charter of the City of Los Angeles (Sec. 13) and the Constitution of the State of California (Art. XX, Sec. 3) require an oath of support for the Constitutions of the state and federal government. That oath is not involved herein. The content of the oath set forth in Ordinance No. 94,004 reaches far beyond the confines of support for the fundamental law, and trenches into areas normally protected from governmental intrusion under the Bill of Rights. Nor have the respondents furnished any support for their assertion that a state may dismiss an employee in its civil service for refusing to assert his "past loyalty"—whether it be for a period of five or twenty years, or, so far as the respondents seem to believe, a life time. The question whether loyalty may be so coerced, and whether such a pervasive restraint may be imposed upon employees of the state, is one which this Court cannot fail to answer, it is respectfully submitted, consistent with its constitutional commission. Further, to dismiss an employee because he refused to swear whether or not he is a member of "certain named organizations" raises important questions concerning the

fundamental right of assembly and association to which the respondents in their brief have made no reply.[1]

The issues involved herein affect the power of the state to reach and lay burdens upon liberties of thought, speech, association and petition; to compel disclosures under oath which involve the exercise of First Amendment liberties as governmental functions of the people in a self-governing society; to coerce and censor the free choice of opinions and associations; to compel and coerce "loyalty"; to audit and weigh the "past loyalty" of its employees. These are issues which the respondents in their brief have avoided. They should not remain unresolved.

II.

To the argument that the Ordinance here constitutes a bill of attainder, the respondents reply that "the people of a City may require that their servants have been loyal to the constitutional government of the United States and the state during the five-year past period" (Br. p. 18). It is submitted that such an answer fails to even touch upon the essential aspects of the serious question raised herein.

If advocacy of certain proscribed doctrines or membership in certain named organizations are conceived by the state to be vulnerable to punishment, penalty or disability,

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[1]There are two organizations named in the Ordinance, the Communist Party of the United States of America and the Communist Political Association. With respect to that section of the oath concerning advocacy of the forcible overthrow of government by violence "or other unlawful means" there has been no narrow construction of the language limited to the presently existing government as in *American Communications Association v. Douds*, 339 U. S. 382, 406. We do not concede the validity of the Ordinance even if its language were in this single respect so narrowly construed.

great or small, total or conditional, immediate or suspended, the imposition thereof may be had under our law only through action by some agency exercising judicial powers and observing the rules and safeguards of fair hearing and trial. The Legislature is utterly without right to adjudicate individual causes, civil or criminal, or to impose upon named or identifiable individuals or groups punishment, penalty or disability of any kind. This is the entire meaning of the constitutional provisions and principles relating to bill of attainder, special legislation and the separation of the legislative from the judicial powers of government. (*United States v. Lovett*, 328 U. S. 303, 317.)

The legislative test oath contained in the Ordinance herein is almost identical in its form to the oaths stricken down in the historic bill of attainder cases of *Cummings v. Missouri*, 71 U. S. 277, and *Ex parte Garland*, 71 U. S. 333. In the *Cummings* case the State of Missouri required all public officers and all preachers, teachers, lawyers and executive officers of corporations as a condition of continued office to take an oath after the termination of the Civil War that they had never engaged in any conduct hostile to the United States or expressed any disloyal sentiments or advised, aided or abetted any enemies of the United States. The *Garland* case involved a kindred oath applied by the federal government to members of the bar of the United States courts. The consequences of inability to take the oath was disqualification, precisely the same as the consequence here.

This Court pointed out in the *Cummings* and *Garland* cases the essential vice of such test oaths. This Court stated:

> "In these cases the legislative body, in addition to its legitimate functions, exercises the powers and office of judge; it assumes, in the language of the text books, judicial magistracy; it pronounces upon the guilt of the party, without any of the forms or safeguards of trial; it determines the sufficiency of the proofs produced, whether conformable to the rules of evidence or otherwise; and it fixes the degree of punishment in accordance with its own notions of the enormity of the offense . . . And this is not all. The clauses in question subvert the presumptions of innocence and alter the rules of evidence which heretofore, under the universally recognized principles of the common law, have been supposed to be fundamental and unchangeable. They assume that the parties are guilty; they call upon the parties to establish their innocence; and they declare that such innocence can be shown only in one way—by an inquisition, in the form of an expurgatory oath, into the consciences of the party."
>
> 71 U. S. 277, 323, 327.

The respondents attempt on the one hand to avoid the infirmity of the Ordinance by designating it as a requirement "of qualification merely" (Br. p. 21); on the other hand, they make abundantly clear (Br. pp. 20-21) that in fact the Ordinance is intended to punish for past belief and association. In *United States v. Lovett*, 328 U. S. 303 the rule of the *Cummings* and *Garland* cases were explicitly applied to a legislative act discharging three federal employees from further federal service for alleged "disloyalty." "This permanent proscription from any op-

portunity to serve the Government is punishment, and of a most severe type" (*supra*, p. 316). Respondents' reference to Section 432 of the Charter of the City of Los Angeles accentuates the significance of the question raised here. As this Court stated in the *Garland* case: "The exaction of the oath is the mode provided for ascertaining the persons upon whom the act is intended to operate, and instead of lessening, increases its objectionable character." (71 U. S. 333, 337.)

III.

In the light of this Court's grant of certiorari in the *Parker* and *Steiner* cases, there can be no doubt, it is respectfully submitted, that appropriate federal questions have been presented which should be finally decided by this Court. Under the provisions of the Charter of the City of Los Angeles (Sec. 112(a)), no person in the classified civil service can be discharged except for cause. The petitioners were discharged solely upon the ground that they had failed to comply with the terms of the Ordinance [R. 4-5]. The Civil Service Commission sustained their dismissal upon that ground alone [R. 25-26]. It is admitted by the respondent that but for the asserted failure to comply with the provisions of the Ordinance, petitioners each performed the services required of him in a competent and satisfactory manner, and were at all times fit and suitable persons to fill the positions from which they were removed [R. 6]. The respondents relied solely and entirely upon the Ordinance, to justify the discharge of petitioners. The constitutionality of

the Ordinance was attacked in detail in the trial court [R. 7-9]; on appeal [R. 40-46]; on rehearing [R. 38]; and on petition for hearing to the Supreme Court of California [R. 35-40]. These matters were open for judicial determination (*Gorvin v. Chambers,* 195 Cal. 212) and presented federal questions cognizable by this Court and necessary for determination. (*Fowler & Steiner v. County of Los Angeles,* 337 U. S. 92. 338 U. S. 327.)

Conclusion.

Wherefore, the petition for writ of certiorari to the District Court of Appeal of the State of California, Second Appellate District, should be granted.

Respectfully submitted,

JOHN T. MCTERNAN,
Counsel for Petitioners Garner, et al.

CHARLES J. KATZ,
Of Counsel.

Service of the within and receipt of a copy thereof is hereby admitted this.....day of February, A. D. 1951.

2-20-51—60